CHAIRMAN NOBER: Thank you very much. I know many of you on the prior panel have come from far afield on a snowy day. So we appreciate that or at least between the snow. Thank you all for putting the time and effort into this.

I did ask for ideas in addition to those in ex parte 638, and I appreciate those of you who have come up with some new analysis of our existing ideas. That has been helpful for me in wanting to be sure that the purpose of this hearing is to not only look at our ideas, but if anybody had any better ones, tell us what they are and we will have a chance to evaluate them and figure out what to do with them and how to go forward.

I do think people today have raised some very difficult questions about in cases, what is procedure and what is substance and is there in many cases a difference. One thing that I have heard several of you suggest is maybe there are ways of standardizing the projections that we have in certain areas or standardizing the technical assumptions that we have. That is both a substantive but if we come up with a procedure for stipulating to many of those, that is procedural as well as substantive. It sounds like, if I hear you all saying, that that would be of some benefit.

Now, I asked this question this morning, and I will ask you now. I will start with the projections first and get to some of the other matters. Our Board staff is being asked to arbitrate disputes over the number of miles that you carry cars, the number of tons per car.

Why are we being asked to do this? Why can't you and the other counsel figure out a way to stipulate, "Here is the number of miles per car?" Why is that having to be litigated and our staff having to come in on the weekends and arbitrate this?

MR. HEMMER: Perhaps we need adult supervision. We suggested in our comments that a Board-moderated, staff-moderated technical session at the beginning of the case could iron out an awful lot of those issues. Doing it through pleadings really is

quite inefficient. There seems to be in both panels, I think, some interest in doing something like that.

MR. SIPE: Those kinds of issues, number of route miles, number of tons per car, I am actually not personally aware that they are hotly contested, but perhaps that is because I have been fortunate enough to delegate those issues to some of my colleagues.

I think they could be settled at the threshold with minimum Board input by sitting around a table and saying, "Let's agree on what are the actual parameters of this movement."

Those are not the hard issues in my view.

MR. WEICHER: If I may, I think there are a couple of different aspects of this. I am not exactly sure which issue we are talking about, but I can envision two situations.

In the context of variable costs or URCS costs or what is happening in the specific movement on our system, that should not be something that ends up in a difficult dispute or that couldn't be very quickly resolved through a technical conference if there is some misapprehension of the cars or the equipment actually being used in a real world.

My suspicion would be that the place where those issues are very much -- when we get into the hypothetical world of the stand-alone railroad and the stand-alone railroad is hypothecated, it can work this way, go that way, head a little equipment this way versus that way, take a shortcut here or do this or that, those are probably very difficult because now we are in the land of how far from real railroad operations and how ungrounded the assumptions can be. Those are, unfortunately, difficult disputes that probably fall back on the Board.

MR. MOATES: I would echo that point, particularly about at least I am familiar with the issue of tons per car. You said the car manufacturers are in, and they know what their cars are. The difficulty is that customers underload and overload. When you say there is a variable cost, we ought to just be able

to get the records out and look at that.

The problem is in the stand-alone world, as Mr. Weicher suggests, they hypothesize they are going to be as efficient as anybody could ever be. And so they are going to say every car will carry 110 or 112 or 115 tons when, in fact, their own clients' shipping records on the railroad who is defending this case will show that many times it had 95 tons or 98 or 102. I know we have had some of those issues in our cases.

CHAIRMAN NOBER: I am going to need to confer with Commissioner Morgan for a moment. Commissioner Burkes, unfortunately, had to leave to catch a plane.

COMMISSIONER MORGAN: I just want to revisit some of the discussion I had with the earlier panel about the timing of mediation and the combination of mediation and staff technical conferences to move the discovery process along and the case itself along.

Take mediation for a minute. There has been discussion of doing mediation before the case is actually filed, doing mediation right at the beginning and once the case is filed, doing mediation after the evidence has come in.

I just want to get your thoughts on where you feel mediation could be the most useful. Obviously we all agree it is not the panacea. It won't solve everything. But, again, my view is that if we can go in and surgically place mediation and technical conferences in the right place along a path, we can perhaps work through some of these issues a little bit more effectively.

MR. SIPE: Let me take a quick stab at that, Commissioner Morgan. My own view, which is informed from being involved in mediation in other contexts, is that it would be helpful at the outset of the case.

I don't think there is a big difference as to whether it is done before the filing of the complaint or afterwards, but if it is afterwards, you can't be responding to discovery and

mediating at the same time. So you have to craft a schedule that will allow you to have enough time after the complaint is filed to make it mediated and make it meaningful.

I think having mediation after all of the evidence has been submitted is less likely to be successful. I do know, though, that there are situations in which a mediator will be involved in the case at the inception and not succeed in bringing the parties together but will remain available if they want to come back to the mediator at a subsequent juncture. Sometimes that works as people's positions change or as the evidence comes in.

So if you had an initial mediator at the outset of the case and there was anything even remotely promising to the process, you could arrange to have the parties request to go back and take the issue up at some subsequent juncture.

I would be against the idea of saying we won't have mediation until all of the evidence is in. I think people tend to get locked into their positions at that point, and it is less likely to be productive.

CHAIRMAN NOBER: So would you all concur with the earlier panel that everyone is for mediation but no one thinks it is going to work?

MR. SIPE: I think it is a good question, and I thought about responding to that question when you asked me. I thought the other people did a good job of saying, "No. We don't think it's never going to work. We just don't think it's likely."

I will go back and say what I said before. I think it depends to a high degree on the skill and motivation of the individual mediator. There are some people who are really good at this. I think if you have a committed, skilled mediator, there is a chance you could resolve some of these cases.

MR. MOATES: I agree with that. I would echo something that was said by at least one I think of the shipper representatives. It will never ever work if it is just going to

be us lawyers and consultants meeting with each other. You have to have a business person present who has authority to settle the case, not just somebody from so many staffs, somebody who has corporate authority to settle the case. That at least gives some possibility that that business person, like I guess Sam said earlier, maybe hears something differently from a neutral mediator than he has heard it from his own counsel that could cause movement.

MR. WEICHER: If I may, I think in terms of your initial question, I think it is more promising up front before the case has been launched and the money has been spent.

I am not overly optimistic, Chairman Nober, that it really worked, but it could. I think perhaps at the back end, you might have a process where if you put out a notice that the parties interested in mediation on a short time frame and a quick basis, especially as Mr. Sipe suggested, if there had been an initial one, that you might regroup.

That, it seems to me, to have any hope, has to be more on a basis that the parties are willing to give it another shot because one or the other spent the money and figures, "The heck with it" and then it's probably not worth taking the time and money of the mediator, the principals from the companies, and so forth to indulge in it.

MR. SQUIRES: Commissioner Morgan, I favor mediation before the complaint is filed, as the Board has proposed to rule. I think that structure poses the greatest likelihood of resolving the parties' disputes before litigation has actually commenced. I think once the litigation starts, that will be the parties' focus, rather than the mediation would run concurrently.

COMMISSIONER MORGAN: I think that we all would agree that anything we can do to alleviate some of the delay and burden associated with this process, even if it means one case is affected in some positive way, is a benefit.

As everybody knows, the Board has been struggling with

this type of case and a lot of other cases here and trying to try a lot of different things to lessen the burdens, to reduce the delays and the costs. So I think all of your comments are helpful in putting that in the proper perspective.

If I might just ask one other question, --

CHAIRMAN NOBER: Sure.

COMMISSIONER MORGAN: -- to shift to another topic? And that is this whole question of system average cost versus movement-specific cost. I think a comment has been made that we should use system average costs unless that somehow creates an unfairness or affects the result in some significant way. And then in that case, we should be looking at the movement-specific costs.

Would any of you care to comment on how if that were approached that we would want to pursue how you would go about making that determination?

MR. SIPE: That was AAR's proposal, Commissioner Morgan. Your question is a really good one. We have not explored the details of how this might be implemented. So anything I say is subject to veto by my colleagues.

I think you would have to craft some pretty specific procedures for both what I would calling the going-in phase, the determination of the jurisdictional threshold, and possibly the rate prescription phase.

I mean, you could craft a rule that said if both parties agree that the RVC ratio exceeds 180 percent by X percent or more, let's say 10, based on URCS system average costs, then there is not a need at that point to develop movement-specific costs because there is not a dispute. The carrier, in effect, has conceded quantitative market dominance.

And there are cases where the carriers' rate will conceivably be above 180. So you could have a rule that was sort of presumptive if you were above 180 by more than X percentage points. You don't need to go there at that time. If it were a

disputed matter, then you could have limited focused discovery into the elements of movement-specific costs, which the Board viewed as appropriate at that juncture and similar kinds of rules to guide it on the other end if you ever got to a situation where the rate prescription turned on a precise calculation of variable costs.

MR. MOATES: Let me echo what Mr. Sipe said particularly about the cases. And all three of the Eastern cases are of this ilk, where the railroads did not contest the existence of the 180 minimum RVC generated by the rates at issue. Every one of those cases we said right in our answer we were not contesting that.

If and only if, as I said, before, variable costs become an issue because you were to find that there was a maximum reasonable rate below the rate established that was generated by the SAC test, then you may need to go back and look at where the precise numbers fall but probably not.

One observation I would make I think is important. And that will be the line here between the East and the West. There is a difference between the Eastern and Western railroads in terms of the system average cost issue because the Eastern railroad coal operations don't have the same physical characteristics typically of the dedicated cycling unit train from the Powder River Basin to wherever that the Western friends have. Sometimes we wish we did. But that's not the paradigm of the Eastern operations, as I think the Board knows, where typically railroads serving a multiplicity of mines in the Appalachian Mountains and the kind of terrain and they have to pull cars out, assemble them in trains, that means that the so-called uni train or freight-load kind of operations for the Eastern railroads are often more costly, considerably more costly, in some cases than the system-wide average for intermodal shipments or trainload shipments and the like that are moving beyond Chicago or New York or what have you.

CHAIRMAN NOBER: Let me just return to discovery for one minute. And then I have some questions of some other folks. This morning's panel everyone agreed, look, in a rate case, we have done a bunch. We basically know what documents need to be produced, what we need to put together to make our case.

All of you today have said essentially the same thing. We think we know what needs to be put together to be produced. Yet, we have discovery taking multiple years, which I think is unfortunate, costly, and you can tell me what the burdens are on your railroads.

Now, I think that is unnecessary. I hope all of you agree that that is unnecessary. And the question is, what can we do sort of procedurally to get a handle on that?

One suggestion that was made was to limit the number of discovery requests. The response to that was that would just lead to broader ones and produce more disputes. Is that a fair point?

MR. HEMMER: We are the ones who suggested the limitation on the number of discovery requests. As the discussion has evolved during the day today, I think the parties have been gravitating towards some sort of notion that the Board might possibly be able to maybe do a workshop, for example, establish a sort of set pattern of discovery requests that ought to be answered in every SAC case. I think there is some potential merit to that that would truncate the need to fight over how many discovery requests is the right number.

I wish it were true that we have devolved to the point where there is a set bunchy of requests that, as the shipper's representative said this morning, the railroads ought to just produce the stuff, they know they have to produce it. It doesn't work that way.

In each case, we receive a substantial number of new types of requests we have never seen before. We see requests to revisit issues that you have already foreclosed. We always get

asked for internal costing models, for example, even though you said over and over and over again those shouldn't be produced.

In one of the cases that we are litigating right now, the Board itself ruled that many of the requests were over-broad, over-reaching, went beyond what we had had to produce before.

So if we could find some common ground, I would encourage anything the Board could do to identify it.

MR. WEICHER: I want to agree with that and say your initial premise, I wish it were more correct, but I don't think that the two sides agree on what that basic set of elements is.

If that could be framed and then the Board adopt a set, sort of like in the last decision, where they have set out a framework for stand-alone costs. Well, if there was a framework for presumptively valid -- I mean, I would never want to suggest that somebody can't challenge something as in or out of the set in a given case on a high showing, but that might be worth the effort. What are we willing to say on both sides should be fundamental? And where are the elements that are outside of that list? And then that would be something you could address perhaps to come up with that list. And then the rest would be subject to challenge.

MR. MOATES: I made the point before, and I would like to make it again. We saw it in the Eastern cases, which, by the way, didn't take years and years. Discovery in those cases was handled, frankly, very efficiently for stand-alone cases. Those cases were filed, two of them, basically January 1 of 2002, the other one at the end of the first quarter of 2002. One was completely submitted to you in the brief. We are filing the brief in the CPL case tomorrow. And the third one has the brief due in mid April.

The discovery was well over by the middle of last year. There was one small delay due to some unexpected difficulties and the untimely death of one of my partners in one of those cases and nothing we could do about that, obviously.

I would submit those cases are pretty good examples and you don't have to take years and years. But the costs, the costs, Chairman Nober, if the shippers are going to be insistent that we have to produce the entire system of traffic for a year or in that case they ask for multiple years when you negotiated some of it down, there ought to be some way to share those costs. We have to do as CSX did, run a computer 24 hours a day 7 days a week and keep people there dedicated to doing that just to meet these requests.

There ought to be some way that the shipper shares part of that cost, not an unreasonable part, but the railroads have to pay hundreds of thousands of dollars to give to the other side the information. Why shouldn't the other side help to defray some of that cost?

CHAIRMAN NOBER: Let me turn to confidentiality for a moment because I have to confess I am somewhat confused by the discussion today about that and hope through my questions to -- I guess I assume that they will belie my confusion.

What would specifically be helpful about in-house counsel being able to see the -- I mean, how would it set the process forward for in-house counsel being able to see highly confidential information?

MR. SQUIRES: I raised that point. So I will attempt to answer your question. I think that in-house counsel have a special role to play in these cases due to their familiarity with business conditions underlying these disputes?

I think that by being able to review highly confidential information, they will be able to contribute to the defense or prosecution. The same arguments, parallel arguments, hold for the other side as well.

Together that will lead to more efficient processing of these disputes. So it is an efficiency-based rationale in my opinion.

CHAIRMAN NOBER: Now, if I understand the problem, it

is that you all mark certain of your submissions as highly confidential. The shippers also mark certain of their submissions as highly confidential. They become commingled with that and other highly confidential information.

And then anything that is highly confidential can only stay with the outside counsel and consultants and can't go back to either side's in-house. Is that correct?

MR. SQUIRES: That is basically correct.

MR. MOATES: To some degree, but there is a little different problem that I was trying to talk about. I certainly defer to Mr. Squires' concerns as an in-house counsel.

I was trying to make sort of an intermediate point that when these designations get put on, -- and we put them on, too, because of the highly sensitive traffic and other data.

We have found out in a number of these cases that when the other side uses the data and hands a filing back to us and files over the Board and they put that designation on the cover, which is a big red stop sign for these guys, we find out later, sometimes weeks later, that the reason it is on there is appropriately because of his highly confidential data. Of course, he can look at that, but we don't know that that is what the stop sign is.

Sometimes there are two or three or four references in several hundred pages of filings that are highly confidential from them. And all we are asking for is some manner to make them right up front say, "Oh, it's only page 14, 82, and a couple of sentences on that page." We can redact that, black it out, and then he can look at it. But the trouble is we don't know that.

Yes, our data is highly confidential, but it is his data. He can look at that. Our protective order doesn't keep the railroad that produced the highly confidential data from having its own people look at it.

CHAIRMAN NOBER: Now, in a normal commercial litigation, there is confidential business material that is

produced all the time. I mean, that is a normal process. What are the restrictions that apply to in-house counsel in any federal case? In every litigation you have, you probably have confidential business material that is produced. And can only outside counsel see it in that context?

MR. SQUIRES: Those are generally subject to negotiations between the parties on the terms of the protective order, but in some situations, in many situations, in-house counsel may be privy to all information produced in litigation and covered by the protective order. And he or she will sign the protective order and be bound by it.

One other point I would like to make, Chairman Nober, as several people have emphasized, these cases are extremely expensive for the railroads. Without being a full participant, without being privy to all of the information that is included in the proceed, it is all the more difficult for in-house counsel to monitor and control those costs.

MR. HEMMER: Chairman Nober, I have been involved in quite a bit of litigation outside this context. The normal procedure is that a party making a filing will redact whatever truly shouldn't be seen by either the public or perhaps in some extreme cases by opposing in-house personnel.

I have never seen in litigation, maybe others have what has become standard in the STB, which is that the entire filing gets the designated highly confidential because there is something buried in it that might not be appropriate to disclose to the other side.

In the FMC case, we voluntarily, Union Pacific voluntarily, produced a redacted version that could go to in-house counsel and personnel and a public version. We did them all. It wasn't bad. It wasn't hard to do.

MR. WEICHER: Chairman Nober, if I may, as a long-serving inside counsel who has worked on these cases for years, I am not sure what I haven't seen because I haven't seen

it.

COMMISSIONER MORGAN: What you don't know won't hurt you.

MR. WEICHER: I know that after some time in some of these, we will get a redacted version and then we will get a sense of it. But we are also in the role of interface between our actual systems, our real world as we see it railroad-wise, and a case which is manipulating or imposing or changing assumptions or interfacing with our real railroads.

So that is part of the difficulty in trying to understand or be aware of assumptions that, even though we have very good, experienced outside counsel and consultants, where there is a link that is either delayed or impeded trying to understand what is being talked about that affects our railroad.

CHAIRMAN NOBER: I guess what I would ask all of you is, the burden of producing a redacted version sort of as a presumption, would there be enough of a benefit to justify that? How would you all --

MR. SIPE: It is partly a matter of timing, Chairman Nober. When you are actually in the last phases of putting together one of these stand-alone evidentiary submissions, people are in extremis. And they would be in extremis extremis if they had to simultaneously produce a redacted version.

I think one thing that would work is if there were a requirement that a redacted version be produced within short order of the actual filing. That would avoid the problem I just alluded to.

CHAIRMAN NOBER: If it were just a couple of sentences, even in the extremis of getting one of these big filings in, in theory, that could be done without too, too much more work.

MR. SIPE: That is true. If it were just a couple of --

CHAIRMAN NOBER: If it were a major burden, then perhaps --

MR. SIPE: I am afraid in most cases where it is a major evidentiary submission, it is more than just a couple of sentences, but I don't believe its unduly burdensome to do it after the fact and do it promptly after the fact.

In fact, there was a case, for reasons I won't go into here that entail some bad memories for me, where the Board asked us to redact sort of after the fact the evidentiary filings I think so the Board knew what it could use in reaching its decision. And we were able to do that.

MR. MOATES: This may sound a little self-serving, probably will, but again I have to emphasize the railroads are producing a lot of highly confidential information. Everybody you have heard here today says we are uniquely in possession of most of the information from these cases. That is the reality.

So if we have to produce the redacted -- and I guess what is good for the goose is good for the gander. I agree with Mr. Sipe. There is going to be a lot more to be redacted from the railroad filing potentially that is highly confidential than the other way around.

Again, I probably sound like a broken record, but I keep talking about situations where a stand-alone filing, a main stand-alone filing, from a shipper comes back to the railroad, says "highly confidential," I can't give it to you. We find out weeks later, yes, it's full of highly confidential information. It is ours. And maybe there is a handful of things that aren't ours. And that is what we would like to know sooner, rather than later.

CHAIRMAN NOBER: One other question on a slightly different subject that I asked the panel this morning and I will ask you -- and this is more probably over the line into substance and procedure, but you all have seemed to indicate that more certainty in our modeling would be a help in the cases.

I asked the panel this morning. I asked, "Would more certainty be a help?" You all have seemed to indicate you think

it would be in terms of more certainty and what kinds of variable cost models we use.

This morning's panel said, well, they think our precedents have created enough certainty and there is no reason for us to move to sort of administrative presumption as to what kind of model we are going to use.

How do you all feel about that?

MR. SIPE: Let me take a stab at this. It may be an area where we have some difference of opinion. I don't think that certainty in development of variable costs is really the issue except in the rare case because these cases, we believe, are not and should not be about a maximum rate at 180 percent of variable costs.

Now, the exception to that is a case like Mr. Hemmer's case currently pending before the Board, which is where the parties have stipulated. It is not a SAC case. It is 180 percent of variable costs. And that is because both agreed that the rates were not far off from that.

Take a case where the railroad and the shipper both acknowledge that the challenged rate produces an RVC ratio of over 200. We don't think in that case knowing 180 has much, if anything, to do with precision, has much, if anything, to do about how the case comes out or how we can assess the likelihood.

We think knowing how the case would come out on a SAC basis, if the SAC model were indeed predictable, that would be a very different issue, but I think that predicting the outcome of the stand-alone cost determination given the myriad of factors that go into a stand-alone cost evidentiary presentation is very hard. I would be reluctant to say that the Board should make its SAC model more formulaic in order to make it more predictable.

CHAIRMAN NOBER: Okay. Do you have anything else?

COMMISSIONER MORGAN: Just one other question on discovery. A lot of discussion about the standard that we are proposing for discovery. Is the position of all of you that the

proposed discovery standard that the Board has put forth is a new standard or reflects the decisions that the Board has issued in the discovery area over the course of time?

MR. SIPE: I'll take a stab at that again, Commissioner Morgan. It is AAR's position that the discovery standard you're proposing is the one that the ICC contemplated when it issued the coal reg guidelines. And that is somewhat narrower than the broad relevant standard, which is the Board's general standard.

I would say that the standard you are proposing is also somewhat narrower than the standard implicit in your recent discovery decisions.

MR. WEICHER: I would agree with that from our standpoint in that the standard probably is the standard, but in the slicing through the cases and these kinds of things we have had to dispute, some of the decisions have probably from our standpoint been broader than that standard, as was originally set up or suggesting the standard that you would be putting in or reinstituting or rerigorizing would be allowing.

MR. HEMMER: I suppose a real world test of that for us is how often do we find ourselves compelled to produce something that then doesn't get used in a case. And that happens in every case.

CHAIRMAN NOBER: Okay. Well, again, I have no further questions. We appreciate all of your time and your patience through our questions and your very thoughtful presentations, both for your panel and the earlier one. It certainly would be very helpful to us. If there are no further comments, the meeting stands adjourned.

COMMISSIONER MORGAN: Thank you all.

CHAIRMAN NOBER: Thank you very much.

(Whereupon, at 1:57 p.m., the foregoing matter was adjourned.)